(3)

No. 99-359

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1999

DONALD LANDRY, ET AL.,

*Petitioners,*

*v.*

TOM REILLY, ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

## REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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December 13, 1999

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DONALD LANDRY, ET AL.,

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## REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## ARGUMENT

### I. PETITIONERS' CLAIM IS NOT MOOT.

This case is not moot. Respondents' contention that it is, Opp. Pet. 16-17, is premised on the procedural fact that, after issuance of the Supreme Judicial Court's decision, the matter was remanded to the Superior Court, where the complaint was dismissed. Resp. App. at 25a-26a. The "mootness" argument is

wrong for two reasons: (A) as a matter of law, the case is reviewable because the decision of the Supreme Judicial Court is "final" within the meaning of 28 U.S.C. § 1257(a), *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), and; (B) as a matter of fact, the final order of dismissal on which respondents' mootness argument hinges has been vacated by the Superior Court. See petitioners' supplemental appendix, *post*, at Supp. App. 19s.a.

**A**. The Supreme Judicial Court's ruling that the act "does not violate the Fourth Amendment," App. 11a, is a "[f]inal judgment or decree[] rendered by the highest court of a State" under 28 U.S.C. §1257(a), and is therefore within this Court's certiorari jurisdiction, despite the fact that the Supreme Judicial Court's rescript remanded the case to the Superior Court "for further proceedings consistent with" its opinion. App. 26a. In its present posture, this case falls squarely within the first category of cases described in *Cox Broadcasting Corp.*, *supra*: The Supreme Judicial Court's resolution of the Fourth Amendment question is "conclusive" of the entire case, and the outcome of any further proceedings that may be had in the state court is "preordained." 420 U.S. at 479. Furthermore, whatever further state court proceedings might take place cannot involve any other federal questions, see *id.* at 478, because petitioners have waived them. Supp. App. 20s.a.-23s.a.[1] Accordingly, the

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[1] Although petitioners' complaint alleged federal questions other than the Fourth Amendment claim presented here, see App. 31a-32a at n.4, petitioners have not claimed an appeal from the Superior Court's denial of their motion to reconsider the dismissal of their complaint, and do not intend to do so. Petitioners concede here, as they have in the trial court, Supp. App. 20s.a.-23s.a., that they have waived all claims raised in the amended complaint other than the Fourth Amendment claim raised in the instant petition. See, *Asarco Inc.* v. *Kadish*, 490 U.S. 605, 610-612 (1989) (state court decision "final" under § 1257, even though decision remanded case to state trial court for determination of other federal law questions, where respondents withdrew those requests on appeal); *American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274, 277-279 (1980) (similar).

Supreme Judicial Court's resolution of the Fourth Amendment question must be "deemed final" within the meaning of § 1257(a). *Id.*, at 479 .[2]

**B**. After the Supreme Judicial Court issued its decision in this case, petitioners' moved to stay issuance of the rescript pending the filing and disposition of the instant petition. Supp. App. at 4s.a.-11s.a. That motion was rejected by the Supreme Judicial Court, which instead allowed respondents' motion to expedite issuance of the rescript. Supp. App. at 1s.a.-3s.a.; 12s.a.-13s.a. Accordingly, the rescript issued to the Superior Court, which, on May 26, 1999, dismissed the complaint, and

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[2] Relying exclusively on *Judge Rotenberg Educ. Center* v. *Comm'r of the Dept. of Mental Retardation (No. 2)*, 424 Mass. 471, 677 N.E.2d 153 (1997), respondents attempt to shore up their "mootness" argument with the assertion that, as a matter of state law, a "preliminary injunction lapses on entry of a final judgment." Opp. Cert. 16. This argument is disingenous.

In *Rotenberg* (*No. 2*), the defendants appealed a preliminary injunction which enjoined them from decertifying the plaintiff's authority to use aversive therapy on autistic children in plaintiff's care. *Id.*, citing *Judge Rotenberg Educ. Center* v. *Comm'r of the Dept. of Mental Retardation* (*No. 1*), 424 Mass. 430, 677 N.E.2d 127 (1997). While this appeal was still pending, the trial court, after a thirteen-day trial on the merits, entered a final judgment against the defendants, who appealed that ruling as well. *Rotenberg* (*No. 1*), 424 Mass. at 432-434, 677 N.E. 2d at 131. After first affirming the judgment against the defendants on the merits of the underlying controversy, *id.* at 464-465, 677 N.E. 2d at 150, the Supreme Judicial Court, in the second *Rotenberg* case relied upon by respondents here, dismissed the pending appeal from the allowance of the preliminary injunction because it was "moot." *Rotenberg* (*No. 2*), 424 Mass. at 472 & n. 4, 677 N.E. 2d at 154 (rejecting, "[f]or the reasons stated in [*Rotenberg* (*No. 1*)]," defendants' contention that the preliminary injunction had been entered erroneously).

*Rotenberg* (*2*) plainly has no application to this case, where the trial court dismissed the complaint as a direct result of the Supreme Judicial Court's ruling, which vacated the preliminary injunction petitioners' had obtained in the trial court, and which conclusively rejected the merits of the Fourth Amendment claim that petitioners seek to bring to this Court for review.

then denied petitioners' motion for reconsideration. Resp. App. at 25a-26a. Respondents believe that petitioners' failure to pursue an appeal from the judgment of dismissal renders the instant petition moot. Opp. Pet. at 17.

It would be a curious rule of law that enabled a party which had prevailed before a state's highest court on a dispositive question of federal law to insulate its victory from this Court's certiorari jurisdiction simply by securing a final judgment in the trial court before the losing side had time to have its petition considered. Nonetheless, in order to eliminate the procedural impediment perceived by respondents, as soon as petitioners received respondents' opposition, they presented the Superior Court with an emergency motion to vacate the final judgment and stay proceedings pending this Court's disposition of the case. Supp. App. at 14s.a.-18s.a. After a hearing, the Superior Court allowed the motion, while leaving the injunction dissolved, "in accordance with the Supreme Judicial Court's decision, *Landry* v. *Attorney General*, 429 Mass. 336, 338 (1999), and related rescript." Supp. App. at 19s.a. Therefore, even assuming, solely for the sake of argument, that respondents' "mootness" concerns had any basis to them at all, those concerns have been fully addressed: There *is* a "live dispute" between the parties.

## II. RESPONDENTS' OPPOSITION UNDERSCORES THE NEED FOR SUPREME COURT REVIEW: DIFFERING RATIONALES HAVE BEEN USED BY THE LOWER COURTS TO UPHOLD MANDATORY DNA SEIZURE STATUTES, AND THE "SPECIAL NEEDS" ARGUMENT ADVANCED BY RESPONDENTS HAS BEEN REJECTED BY AT LEAST ONE CIRCUIT COURT.

On the merits, respondents' opposition serves only to highlight why this Court should grant certiorari. Without respond-

ing to petitioners' argument that the constitutionality of DNA seizure and dissemination statutes has become an issue of truly national importance since Congress enacted the DNA Identification Act in 1994, Cert. Pet. 23-27, respondents contend that review should not be granted because there is no split among the decided cases. Opp. Cert. 8-13. Although petitioners have not suggested that there is a split, a reading of the cases cited by respondents does not reveal any coherent or consistent rationale to justify the result they have reached. Respondents acknowledge that the courts are divided on the question of whether the "special needs" doctrine is applicable to the question of whether suspicionless DNA seizure statutes are reasonable under the Fourth Amendment. Opp. Cert. 14; App. 13a. Courts and state legislatures are likewise divided on the limits, if any, on the government's authority to make use of DNA after it has been seized, analyzed, and "databanked." App. 11a-12a & n.8. None of the appellate cases that have upheld DNA seizure statutes offer a basis on which courts might draw any principled Fourth Amendment distinction between the suspicionless DNA testing of convicted criminals and the testing of any other class of persons who might reasonably be said to have a reduced privacy expectation in their identity, or to be statistically more likely to commit crimes than the population as a whole.

Respondents' own reliance on the "special needs" doctrine, Opp. Cert. 14-15, is particularly significant because this is an issue on which there is substantial disagreement among the federal circuit courts. Compare, *Edmond* v. *Goldsmith*, 183 F.3d 659, 664-665 (7th Cir. 1999) (Posner, C.J.) (striking down suspicionless drug interdiction roadblock: because, after *Chandler*, suspicionless search regime must involve "'concerns *other than* crime detection,'" the "purpose" of the regime is "critical to its legality. The program must be a bona fide effort to implement an authorized regulatory policy rather than a pretext for a dragnet search for criminals" (quoting *Chandler* v. *Miller*,

520 U.S. 505, 313 [1997]) (emphasis added by the Seventh Circuit), with *Roe* v. *Marcotte*, 193 F.3d 72 (2d Cir. 1999), 1999 WL 731599 (upholding DNA seizure statute under "special needs" doctrine, while conceding that DNA "samples may later be used for law enforcement purposes").

In recommending the "special needs" doctrine as a separate basis for upholding the act, respondents implicitly endorse petitioners' view, Cert. Pet. 21, that the record in this case will present the Court with an opportunity to consider whether that doctrine may validate a suspicionless search regime explicitly concerned with "search[ing] for criminals." *Edmond* v. *Goldsmith*, *supra*. The petitions for certiorari in *Rise* v. *Oregon*, 59 F.3d 1556, *cert. denied*, 517 U.S. 1160 (1996), and *Jones* v. *Murray*, 962 F.2d 302, *cert. denied*, 506 U.S. 977 (1992), were denied before the national DNA data base existed, at a time when many states had not even enacted such a statute, and when it was not certain, as it is now, that law enforcement would seek to make the "collection" of DNA from convicted persons a national goal.

## CONCLUSION

If it is to be "reasonable" under the Fourth Amendment for the millions of men, women, and children in this country who have been convicted of a crime to have their expectation of privacy in their genetic identity reduced to zero (for that is precisely the consequence of legitimizing a regime that mandates mass DNA seizures without any quantum of individualized suspicion), it must be because this Court has said so, and has

explained to them, and all of us, why. Accordingly, the petition should be granted.

Respectfully submitted,

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December 13, 1999

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**APPENDIX A**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
NO. 07899
NO. 07916

DONALD E. LANDRY, et al.,

Plaintiffs-Appellees,

v.

SCOTT HARSHBARGER, ATTORNEY GENERAL, et al.,

Defendants-Appellants.

MOTION FOR EXPEDITED ISSUANCE OF RESCRIPT

In accordance with Mass. R. App. P. 23, the defendants-appellants in the above-captioned matters move for an order that the rescript in these matters issue immediately. As grounds for this motion, the defendants-appellants state as follows.

1. On April 13, 1999, the Court issued a decision concluding "that the preliminary injunction cannot be justified on the grounds relied on by the [Superior Court] judge . . . ." Landry, et al. v. Attorney General, et al., Nos.

SJC-07899 and 07916, slip. op. at 2 (April 13, 1999). The Court ordered entry of the following order on the docket: "The preliminary injunction entered in the Superior Court is vacated . . . ." Id. at 27.

2. The rescript in Nos. SJC-07899 and 07916 is dated April 13, 1999. In the ordinary course, the rescript would issue twenty-eight days later, on May 11, 1999. See Mass. R. App. P. 23.

3. While the preliminary injunction continues in effect, the defendants suffer significant harm. The injunction prevents the defendants from making any serious progress in carrying out the Legislature's mandate to compile the 10,000 DNA samples that will form the nucleus of the state DNA database. The harm is irreparable because inmates, probationers, and parolees required to submit DNA samples are regularly released from the custody or supervision of the Commonwealth.

4. To avoid further harm to the public interest, the defendants request that the Court issue the rescript immediately. Contemporaneously with this Motion, the defendants have filed in the Superior Court a Motion for Entry of Order Vacating Preliminary Injunction Pursuant to Pursuant to Order of Supreme Judicial Court.

WHEREFORE, the defendants request that their motion for expedited issuance of the rescript be allowed.

Respectfully submitted,

DEFENDANTS,
by their attorneys,

THOMAS F. REILLY
ATTORNEY GENERAL

/s/

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Date: April 14, 1999

**APPENDIX B**

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPREME JUDICIAL COURT
NOS. 07899, 07916

DONALD LANDRY & others

v.

ATTORNEY GENERAL & others

PLAINTIFFS' OPPOSITION TO EXPEDITED ISSUANCE OF THE RESCRIPT AND MOTION TO STAY ISSUANCE OF THE RESCRIPT PENDING THE FILING AND DISPOSITION OF PLAINTIFFS' PETITION FOR CERTIORARI

Now come the plaintiffs and oppose the government's motion to expedite issuance of the rescript. The grounds for this motion are as follows.

1. In an opinion and order dated April 13, 1999, this Court vacated the preliminary injunction entered by the Superior Court and remanded the case to that court for further proceedings consistent with its opinion. Landry v. Attorney General, Nos. SJC 07899 and 07916, slip op. at 27 (April 13, 1999).

2. Pursuant to Mass. R.A.P. 23, "the rescript shall issue to the lower court twenty-eight days after the date of the rescript unless the time is shortened or enlarged by order."

3. The government, relying exclusively on the claim that any delay in the issuance of the rescript will cause it

"significant" and "irreparable" injury, seeks an order directing the clerk to issue the rescript forthwith.

4. The government's claims of irreparable injury are not different than the claims that were considered, and rejected, by a single justice of this Court (Marshall, J.) when the government previously moved to stay the injunction pending appeal. See Memorandum and Order of the Single Justice in Landry & others v. Attorney General & others, No. SJ-98-M0065 (January 5, 1999) (copy attached).

5. Considering only the balance of harms and not the merits of the plaintiffs' constitutional claim, the single justice concluded that continuing the injunction pending appeal would cause the government "no specific resulting harm any different from any other stay of the implementation of legislation pending the resolution of a constitutional challenge to the legislation." Id. at 3.

The plaintiffs move to stay the issuance of the rescript pending the filing and disposition of a petition for writ of certiorari by the United States Supreme Court. The grounds for this motion are as follows.

1. The Court's conclusion in this case that a DNA blood search and seizure may be conducted without probable cause represents a substantial departure from the decisions of the Supreme Court in California v. Schmerber, 384 U.S. 757 (1966) and Winston v. Lee, 470 U.S. 753 (1985), and is based on a mischaracterization of the purpose of the DNA Seizure and Dissemination Act as "not to search for evidence of a crime." Slip op. at 15. In fact, as the Court acknowledges elsewhere in its opinion, the Legislature intended the DNA collected under the Act to be used as "'an integral part of the investigation and prosecution of criminal offenses.'" Slip op. at 3 (quoting the Act). Since the purpose of the bodily intrusions mandated by a DNA data bank statute is precisely to search for DNA evidence to be used in the investigation

and prosecution of criminal offenses, Schmerber and Winston are controlling as a matter of federal constitutional law.

2. The Court's decision in this case is also inconsistent with the Supreme Court's decisions in Chandler v. Miller, 520 U.S. 305 (1997), Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995), and Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989), which establish that bodily intrusions conducted without probable cause may be counted as "reasonable" under the Fourth Amendment only when the searches are motivated by "concerns other than crime detection." Chandler, supra.

3. For these reasons, and because the issues to be presented in the plaintiffs, petition for certiorari have national significance, the case is one that will present substantial issues as to which certiorari is appropriate.

4. Furthermore, as the single justice concluded, if enforcement of the Act is not enjoined pending appeal, "the plaintiffs will be subject to the precise search for which they have sought constitutional protection, and will be unable to retrieve any of the DNA data that the Commonwealth may have shared with any other law enforcement officers in the interim." Memorandum and Order of the Single Justice at 4.

5. In these circumstances, it is appropriate that issuance of the rescript be stayed. Indeed, such relief is specifically authorized in the federal courts pending the filing of a petition for a writ of certiorari. See Fed. R.A.P. 41(d)(2) (Court of Appeals' mandate to be stayed for a period not to exceed 90 days where party shows that certiorari petition "would present a substantial question and that there is good cause for a stay").

Wherefore, the government's motion for immediate issuance of the rescript should be denied. In addition, issuance of the rescript should be stayed pending the filing

and disposition of the plaintiffs, petition for a writ of certiorari.

Respectfully submitted,

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Dated: April 22, 1999.

**ATTACHMENT TO APPENDIX B**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-98-M0065
SJC-98-07916
SJC-98-07899

DONALD E. LANDRY, et al.

vs.

SCOTT HARSHBARGER, ATTORNEY GENERAL, et al.

MEMORANDUM AND ORDER

This case came before me for hearing on the motion of the defendants to stay a preliminary injunction issued by a judge in the Superior Court on August 12, 1998. The injunction prohibits, inter alia, the collection, analysis, and dissemination of deoxyribonucleic acid (DNA) samples as provided in the DNA Seizure and Dissemination Act, G. L. c. 22E, §§ 1-15.[1] The defendants have appealed from that

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[1] The order of the judge in the Superior Court entered on August 12, 1998, provides as follows:

> "Pending further Court order, the defendants are hereby enjoined from enforcing the DNA Seizure and Dissemination Act. The defendants will not participate in the collection, analysis and/or dissemination of DNA of the plaintiffs or of anyone subject to the provisions of the Act. DNA samples already in the possession of the Director of the State Crime Laboratory shall remain

order, pursuant to G. L. c. 231, § 118, second paragraph. On November 18, 1998, we granted the application of all parties for direct appellate review. Landry, et al v. Attorney General, et al, SJC-07899. On November 17, 1998, we granted direct appellate review in a related case Landry, et al v. Attorney General, et al, SJC07916.[2] The defendants now seek a stay of the preliminary injunction entered by the Superior Court in this case until this Court resolves the appeal.

The defendants argue that a stay is warranted because the public interest is harmed by preventing the development and implementation of the DNA database "as an important safety tool." Defendants claim that, pending appeal, "crimes go unsolved and recidivistic criminal activity undeterred," and that a continuation of the injunction "may result in the permanent inability of the Commonwealth to collect samples from convicted criminals whose custody or supervision expires during the pendency of the injunction.' The plaintiffs have opposed the motion alleging that they will suffer substantial prejudice if the stay is granted. They argue that, unless the stay remains in effect, their DNA will be collected, analyzed, and disseminated to State and Federal law enforcement agencies, with no guarantee that it can be retrieved if the plaintiffs ultimately prevail. They further point to the financial costs that they will be required to pay for DNA testing and analysis as provided in G. L. c. 22E, § 4(b). Finally, the defendants argue that any further delay in the implementation of the statute will cause no discernible harm to the defendants.

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sealed, impounded, segregated and separately stored pending further notice of the Court."

[2] The Commonwealth has requested that the two matters be consolidated. No action has been taken on that request.

Looking only at the issue of the balance of the harms, [3] I deny the defendants' motion for a stay of the preliminary injunction. I recognize that the stay prevents the implementation of the statute enacted by the Legislature, G. L. c. 22E, §§ 1-15. However, the defendants point to no specific resulting harm any different from any other stay of the implementation of legislation pending the resolution of a constitutional challenge to the legislation. As the plaintiffs have pointed out, the Legislature was fully aware of the pending constitutional challenge when it placed conditions on the appropriation of public funds for the implementation of the statute. See St. 1998, c. 194, § 2, line item 8100-0016. In addition, if the plaintiffs do not prevail on appeal, nothing precludes the Commonwealth from obtaining DNA samples from those individuals who are subject to the statute, after they are released from custody, parole or probation. The Commonwealth makes no claim that it will be unable to obtain DNA samples from those individuals at some point in the future. Nor have they made any claim that the Commonwealth will be required to expend any significant funds in undertaking such an endeavor. On the other hand, if the plaintiffs prevail, unless the stay remains in effect, the plaintiffs will be subject to the precise search for which they have sought constitutional protection, and will be unable to retrieve any of the DNA data that the Commonwealth may have shared with any other law enforcement officers in the interim. That the DNA samples collected may be destroyed will not be protection from the dissemination of DNA data that already has occurred. In summary, I am not persuaded

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[3] Because I conclude that the balance of harms tips toward the plaintiffs, I refrain from any consideration of the likelihood of success on the merits, and express no view with respect to the success of the merits.

that the public interest will be irreparably harmed, while the harm to the plaintiffs is real and irremediable.

In the alternative, the defendants have requested that consideration of their appeal be expedited. That request is reasonable and in any event, is not opposed by the plaintiffs. Accordingly, this matter shall be placed on the March list for an expedited hearing by the Full Court. Expedited disposition of the case will serve to minimize any interim harm, if it occurs at all, that the defendants allege in support of their motion to stay. It is ordered that the parties, after consultation with the Clerk of the Full Court, agree to a briefing schedule of this case (SJC-07899) and the related case (SJC-07916) that is consistent with both matters being heard in March by the Full Court.

/s/
Margaret H. Marshall
Associate Justice

Entered: January 5, 1999

## APPENDIX C

**Supreme Judicial Court for**
**the Commonwealth of Massachusetts**
**1412 Courthouse, Boston, Massachusetts 02108**
**(617) 557-1020**

APR 30 1999

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RE: Docket No. SJC-07899

DONALD E. LANDRY & others
vs.
ATTORNEY GENERAL & others

NOTICE OF DOCKET ENTRY

Please take note that on April 15, 1999, the following entry was made on the docket of the above-referenced case:

MOTION to expedite issuance of Rescript, filed for Attorney General by Rosemary S. Gale, A.A.G. under advisement. jmk. Notice sent. April 28, 1999, Motion to Expedite

Issuance of Rescript ALLOWED. By the Court. Notice sent.

Jean M. Kennett, Clerk

Dated: April 28, 1999

To: John Reinstein, Esquire
Benjamin H. Keehn, Esquire
Rosemary S. Gale, A.A.G.
Sandra F. Bloomenthal, Esquire Inst. for Science, Law & Technol
Atty. Lori B. Andrews
John F. Palmer, Esquire
Atty. Tracey Maclin
Toni G. Wolfman, Esquire
Mary Prosser, Esquire
Amy R. Goldstein, Esquire
Josephine H. Ross, Esquire
Carolyn Baker Ringel, Esquire
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**APPENDIX D**

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT
NO. MICV98-462

DONALD E. LANDRY & others,

Plaintiffs

v.

ATTORNEY GENERAL & others,

Defendants

PLAINTIFFS' EMERGENCY MOTION FOR RELIEF FROM JUDGMENT AND FOR A STAY OF PROCEEDINGS

The plaintiffs in the above-entitled action hereby move the Court pursuant to Mass.R.Civ.P. 60(b), 365 Mass. 828 (1974), and Superior Court Rule 9A(e)(1), to enter an order vacating the final judgment for the defendants entered on May 26, 1999, and staying further proceedings in this action pending final disposition of the case by the Supreme Court of the United States. The grounds for this motion are as follows:

1. On August 18, 1998, the Superior Court entered a preliminary injunction in this case enjoining enforcement of St. 1997, c. 106, and holding that mandatory DNA testing under the statute violates the Fourth Amendment to the United States Constitution and Art. 14 of the Declaration of

Rights. The defendants appealed. The Supreme Judicial Court granted direct appellate review. On April 13, 1999, the Supreme Judicial Court reversed. The Court vacated the preliminary injunction and remanded the case to the Superior Court for further proceedings consistent with its opinion. Landry v. Attorney General, 429 Mass. 336 (1999).

2. On May 26, 1999, this Court dismissed the complaint and entered judgment for the defendants. Plaintiffs' motion to reconsider the judgment and order was denied on July 9, 1999.

3. On August 20, 1999, the plaintiffs filed a petition for a writ of certiorari in the United States Supreme Court to review the decision of the Supreme Judicial Court in this case. Landry v. Reilly, Petition for Certiorari No. 99-359. (A copy of the petition is submitted with this motion.)

4. Although the defendants initially waived their right to file an opposition to the plaintiffs' petition, the Supreme Court, on October 1, 1999, ordered them to do so (A. 1).

5. On December 2, 1999, the defendants filed a Brief in Opposition in the Supreme Court in which they have argued, *inter alia*, that the action is moot because final judgment has entered and the time for appeal to the Massachusetts Appeals Court has expired (A. 2-3).

6. In order to secure a judgment susceptible to review by the Supreme Court, the Attorney General argues that the plaintiffs should be required to pursue an appeal from this Court's final judgment though the Massachusetts appellate courts raising the same issues which were heard and determined by the Supreme Judicial Court.

7. The rules of the Supreme Court require that plaintiffs, reply to the defendants' brief in opposition to certiorari be filed on or before December 12, 1999, in order to ensure consideration of the reply brief before disposition of the petition by the Supreme Court.

8. The procedure recommended by the Attorney General is a waste of time and judicial resources. As a condition of obtaining review in the Supreme Court, it would require a second appeal, entirely *pro forma,* in all cases in which (a) an appeal from the denial or allowance of a preliminary injunction is resolved by reaching the merits of the underlying legal claim, and (b) final judgment enters in the trial court based on the judgment of the state appellate court.

9. The procedure is also manifestly unfair to the plaintiffs and is inconsistent with the public's interest in having important issues conclusively resolved in an expeditious manner. Should certiorari be denied on the present record, in which mootness has been advanced [as a grounds] for denial, it is certain that other persons subject to the statute would bring separate actions challenging its constitutionality so that the merits of the issue could be presented to the Supreme Court. Such a course would significantly delay final resolution of the important issues presented by the petition.

For the foregoing reasons, the plaintiffs request that this court:

A. Treat this as an emergency motion pursuant to Superior Court Rule 9A(e)(1);

B. Enter an order pursuant to Mass.R.Civ.P. 60(b) vacating the judgment entered on May 26, 1999;

C. Stay further proceedings pending final disposition of the case by the Supreme Court of the United States.

Respectfully submitted,

/s/
Benjamin H. Keehn
BBO #542006
COMMITTEE FOR PUBLIC COUNSEL SERVICES
Public Defender Division
470 Atlantic Avenue
Boston, Massachusetts 02210 (617) 482-6212

On behalf of Miriam Cartagena,
John Hallett, Albert Troisi, Vincent
Gallello, and Geoffrey Pironti

/s/
John Reinstein
BBO #416120
AMERICAN CIVIL LIBERTIES UNION OF
MASSACHUSETTS
99 Chauncy Street
Suite 310
Boston, Massachusetts 02111
(617) 482-3170

On behalf of Donald E. Landry and
William Pistorino

Dated: December 3, 1999.

CERTIFICATE OF SERVICE AND NOTICE

I, John Reinstein, certify that on December 3, 1999, I served a copy of the foregoing "Plaintiffs' Emergency Motion for Relief from Judgment and for a Stay of Proceedings," by "faxing" it and mailing it, first-class and postage prepaid, to Assistant Attorney General Catherine E. Sullivan, Office of the Attorney General, One Ashburton Place, Boston, MA 02108. I further certify that counsel for the plaintiffs in this action notified AAG Sullivan that, at two o'clock P.M. on Friday, December 3, 1999, the plaintiffs would request that the foregoing motion be allowed or that a hearing be promptly scheduled.

/s/

John Reinstein
BBO #416120
AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS
99 Chauncy Street
Suite 310
Boston, Massachusetts 02111
(617) 482-3170

## APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT
CIVIL NO. 98-0462

DONALD E. LANDRY, ET AL.,
Plaintiffs

v. ORDER
ATTORNEY GENERAL, ET AL.,
Defendants

After hearing, it is Ordered, that Plaintiffs' Emergency Motion for Relief from Judgment and for a Stay of Proceedings be, and the same hereby is, Allowed in part; and it is

Further Ordered, that the Judgment entered May 26, 1999 dismissing the Complaint be, and the same hereby is, vacated as improvidently entered, the preliminary injunction entered August 18, 1998 nonetheless remaining dissolved, in accordance with the Supreme Judicial Court's decision, Landry v. Attorney General, 429 Mass. 336, 338 (1999), and related rescript.

/s/
Hiller B.Zobel,
Associate Justice,
Superior Court

Dated: December 3, 1999

**APPENDIX F**

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT
NO. MICV98-462

DONALD E. LANDRY & others,

Plaintiffs

v.

ATTORNEY GENERAL & others,
Defendants

PLAINTIFFS' NOTICE OF WAIVER

In conformity with their argument in support of their "Emergency Motion for Relief from Judgment and for a Stay of Proceedings" (see attached copy of letter to counsel for the defendants), which was heard and allowed in part on December 3, 1999 (Zobel, J.), the plaintiffs in the above-captioned matter hereby waive all claims in their amended complaint other than the Fourth Amendment claim that was

the subject of the Supreme Judicial Court's decision in Landry v. Attorney General, 429 Mass. 336 (1999).

Respectfully submitted,

/s/
Benjamin H. Keehn
BBO #542006
COMMITTEE FOR PUBLIC COUNSEL SERVICES
Public Defender Division
470 Atlantic Avenue
Boston, Massachusetts 02210
(617) 482-6212

On behalf of Miriam Cartagena, John Hallett, Albert Troisi, Vincent Gallello, and Geoffrey Pironti

/s/
John Reinstein
BBO #416120
AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS
99 Chauncy Street
Suite 310
Boston, Massachusetts 02111
(617) 482-3170

On behalf of Donald E. Landry and William Pistorino

Dated: December 13, 1999.

December 13, 1999

Cathleen E. Sullivan
Assistant Attorney General
One Ashburton Place
Boston, MA 02108

Re: Landry & others v. Attorney General & others
Middlesex County No. MICV98-462A
Plaintiffs' Emergency Motion for Relief from Judgment and for a Stay of Proceedings

Dear AAG Sullivan:

At the December 3, 1999, hearing before Judge Zobel on the above-captioned motion, we were surprised to hear that the government was concerned that allowance of the motion might somehow enable the plaintiffs to continue litigating claims in their amended complaint that do not pertain to the Fourth Amendment issue which was the subject of the SJC's decision in Landry, and which is the subject of the plaintiffs' petition for a writ of certiorari. As we represented to Judge Zobel at the hearing, the purpose of the motion is solely to address the contention raised by the government in its brief in opposition to that petition that the Superior Court's entry of a final judgment of dismissal had "mooted" the case entirely, so as to deprive the Supreme Court of its Article III jurisdiction to consider even the Fourth Amendment issue that was resolved by the Supreme Judicial Court in the government's favor. Although we believe the "mootness" argument to be wrong as a matter of law for reasons that we will present to the Supreme Court in our reply to the government's opposition to certiorari, vacating the order of

dismissal seemed to us the simplest way to remove the procedural bar that the government claimed to perceive. It is not our intent, now or at any time in the future, to assert any claim other than the Fourth Amendment claim, and, on behalf of the plaintiffs, we hereby waive all claims raised in the amended complaint other than the Fourth Amendment claim. We further represent that, if certiorari is denied, we will assent to entry of a final judgment of dismissal as to the entire amended complaint.

Sincerely,

/s/
Benjamin H. Keehn

/s/
John Reinstein

BHK & JR:lf